

ORIGINAL

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11/23/2016

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA  
Case Number: AF 09-0688

IN THE SUPREME COURT OF THE STATE OF MONTANA

FILED

No. AF 09-0688

NOV 23 2016

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CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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| IN RE THE RULES OF        | ) | State Bar of Montana |
| PROFESSIONAL CONDUCT      | ) | Board of Trustees    |
| PROPOSED ETHICS COMMITTEE | ) |                      |
| RULE 4.4(c)               | ) | COMMENT              |

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The Board of Trustees of the State Bar of Montana (Trustees) met on November 18, 2016 with the chairs of the Technology and Ethics Committees, and unanimously reaffirmed their original recommendation that the Supreme Court refrain from adopting the Ethics Committee's proposed Rule 4.4(c). The Trustees agree with some of the specific concerns articulated by the Technology Committee. Additionally, the Trustees are unpersuaded that being the first in the country to adopt this rule is either necessary or wise. The ABA Model Rules go through a vigorous vetting process, which proposed Rule 4.4(c) has not. In the absence of any signs of an imminent ethical crisis requiring the speedy adoption of a new rule, the Trustees believe that continuing the conversation under the umbrella of the existing rules is the better approach.

The Trustees heard from the Technology and Ethics Committees chairs that discussions among those committees are continuing. In light of the November 25 deadline for comments, the Trustees regretfully will not be able to consider those Committees' final recommendations. However, the Trustees are united in their belief that the proposed rule is unnecessary, confusing and should be rejected.

The Court adopted the following changes to Rule 4.4, effective January 1, 2017:

Rule 4.4 Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

The Ethics Committee has proposed that the Court add a new subsection 4.4(c), which would read:

A lawyer shall not knowingly access or use electronically stored information in a communication or document received from another lawyer, for the purpose of discovering protected work product, privileged or other confidential information unless the receiving lawyer has obtained permission to do so from the author of the communication or document. Communication or document as used in this rule excludes documents produced in discovery and information that is the subject of criminal investigation.

The Trustees reviewed this proposed rule before petitioning the Court in May 2016 to amend the Model Rules. They decided at that time not to include the proposed rule in the petition, and encouraged the Ethics and Technology Committees to continue collaborating on the goals sought to be reached by 4.4(c) as well as the perceived problems with the rule as drafted. *See* Petition in Support of Revision of the Montana Rules of Professional Conduct 6-7 (May 17, 2016). After further discussions within the committees, and a meeting among themselves, the Trustees reiterate their opposition to Rule 4.4(c).

The Trustees believe that Montana's Rules of Professional Conduct should conform as closely as possible to the ABA's Model Rules of Professional Conduct, as those Rules are thoroughly vetted after nationwide consideration. There is nothing uniquely Montanan about lawyers' use of technology that justifies a Montana-specific rule. To the extent clarity is required, Oregon, Washington and Alaska have drafted ethics opinions to address the issues without amending their ethical rules. *See* Oregon State Bar Ethics Opinion 2011-186 (revised 2015); Washington State Bar Association Ethics Advisory Opinion 2216; Alaska Bar Association Ethics Opinion 2016-1.

The ABA did not address the issues raised in the Ethics Committee's proposed rule, other than in the official comment to Rule 4.4. *See* Exhibit A, ABA Report 105A. The Trustees believe the ABA Comments can provide adequate

guidance, as they recognized in their original petition. Petition at 6.

Additionally, State Bar members have been unsupportive of proposed rule 4.4(c). The proposed rule was discussed with many lawyers this year -- as part of Road Show ethics CLEs in Billings and Missoula, the CLE & Ski in 2016, a Cascade County local bar CLE, the State Bar's Ethics CLE in Fairmont, and the September 2016 Annual Meeting. Lawyers attending those CLEs were asked to share their opinions on the proposal, and engaged in robust discussions. Their concerns, shared by the Trustees, are generally that: (1) the language is too broad and confusing; (2) it is unnecessary; (3) attempting to regulate technological advances by rule is overreaching; and (4) the rule creates a higher standard of care for electronic documents than it does for paper ones.

Several lawyers have opined that the rule would be not only difficult to interpret, but almost impossible to enforce. Additionally, it would apply only to lawyers, not pro se litigants, creating another imbalance in enforcement. Finally, it undermines the concept behind the Court's adoption of the language in the Preamble: "Competence implies an obligation to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

The Trustees anticipate that the Technology Committee will submit concerns beyond those raised in this Comment, and that alternate proposals may be

submitted by the Technology or Ethics Committees. The Trustees request that if alternative language is proposed, the Court provide members of the Bar an opportunity to comment on the alternatives.

Respectfully submitted this 23 day of November, 2016.

STATE BAR OF MONTANA

By: \_\_\_\_\_

Bruce Spencer, President

## Acting Competently to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer must to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

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## Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

# 105A Revised

## Comment

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[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were was~~ mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving ~~it the document~~ that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

submitted by the Technology or Ethics Committees. The Trustees request that if alternative language is proposed, the Court provide members of the Bar an opportunity to comment on the alternatives.

Respectfully submitted this \_\_\_\_\_ day of November, 2016.

STATE BAR OF MONTANA

By: \_\_\_\_\_  
Bruce Spencer, President